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IN THE SUPREME COURT OF THE STATE OF OHIO

No. 29621

SCOTT A. BELDEN, ON BEHALF OF HIMSELF AND ALL OTHER POLICYHOLDERS OF THE UNION CENTRAL LIFE INSURANCE COMPANY, AN OHIO CORPORATION, SIMILARLY SITUATED,

Appellant,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Appellee.

STATEMENT AS TO JURISDICTION

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States the above-named petitioner and appellant files this, his separate statement, particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of Ohio appealed from herein, as follows:

Basis of Jurisdiction

Petitioner says that this cause comes into the Supreme Court of the United States on appeal as of right from a final judgment rendered in the Supreme Court of the State

of Ohio which is the highest court of said state in which a decision in this cause could be had where there was drawn in question the validity of Sections 9364-1 to 9364-8, both inclusive, of the General Code of Ohio, on the ground of their being repugnant to Paragraph 1 of Section 10 of Article I and Section 1 of the Fourteenth Amendment to the Constitution of the United States and the decision was in favor of their validity.

Petitioner says that the United States Code Sections 344(a) and 861a are the basis upon which petitioner contends that the Supreme Court of the United States has jurisdiction to review the judgment in question. Said sections read, in part, as follows:

> "Sec. 344(a). A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."
>
> "Sec. 861a. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

Statute Involved

The statute involved in this case was an act passed by the Legislature of the State of Ohio on July 17, 1941 to revise

the laws relating to the conversion of stock life insurance corporations into mutual life insurance corporations and for that purpose to amend Sections 9364-1, 9364-2 and 9364-3 of the General Code of Ohio and to enact Sections 9364-2a, 9364-2b, 9364-4, 9364-5, 9364-6, 9364-7 and 9364-8 of the General Code. Said statutes are set out verbatim in Appendix A attached to this statement.

Date of Judgment

The date of the judgment of the Supreme Court of the State of Ohio sought to be reviewed is May 31, 1944. An application for rehearing was filed in accordance with the rules of said Court and was denied on June 14, 1944. The date upon which the application for appeal was presented to the Chief Justice of the Supreme Court of the State of Ohio was July 1944.

Nature of the Case

This cause involves the question whether by a proposed plan of mutualization a stock life insurance company organized under the laws of the State of Ohio may be converted into a mutual life insurance company and as a result of such conversion the stockholders of the stock life insurance company may be paid in the aggregate Three Million One Hundred Twenty-five Thousand Dollars ($3,125,000) out of the capital structure of said stock life insurance company pursuant to Sections 9364-1 to 9364-8, both inclusive, of the General Code of Ohio, without impairing the vested rights of the participating policyholders in the capital structure of said insurance company, and in that respect whether Sections 9364-1 to 9364-8, both inclusive, of the General Code of Ohio, are unconstitutional, null and void in that they are repugnant to Paragraph 1 of Section 10 of Article I of the Constitution of the United States

which provides that no state shall pass any law impairing the obligation of contract, and repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides, "Nor shall any state deprive any person of life, liberty or property without due process of law."

The judgment of the Supreme Court of Ohio in this cause affects adversely in excess of 200,000 participating policyholders of the appellee residing in forty-six (46) of the United States.

The stage of the proceedings in the court of first instance and in the appellate courts at which and the manner in which the Federal questions sought to be reviewed were raised and the way in which they were passed upon by the Court, are all set forth in the Petition for Appeal and for the sake of brevity will not be restated.

The ruling on the Demurrer in the Court of Common Pleas is found on pages 41 and 42 of the Record. The ruling on the Demurrer in the Court of Appeals is found on pages 67, 68 and 69 of the Record.

The judgment of the Supreme Court of Ohio is found on page 78 of the Supreme Court Record and the order denying the application for rehearing is found on page 78 of the Supreme Court Record.

The Opinion of the Court of Common Pleas of Summit County, Ohio, denying the constitutionality of said statutes, has been reported in 10 Ohio Supplement, page 12, and is found in 45 North Eastern (2nd).

The Opinion of the Court of Appeals of Summit County, Ohio, sustaining the constitutionality of the said statutes has been reported in 73 O. App. 267.

The Opinion of the Supreme Court of Ohio, affirming the judgment of the Court of Appeals of Summit County, Ohio, has been reported in 143 O. S. 329.

The Undisputed Facts in the Record

The Petition (R. 3) and the Answer (R. 44) set out fully the operative facts in this case. The undisputed facts in the record are as follows:

The Union Central Life Insurance Company is a stock life insurance company organized under the laws of the State of Ohio in 1867. It does business and has policyholders in forty-six (46) of the United States (R. 7, 48). The appellant became a participating policyholder in the appellee on October 8, 1931 (R. 3, 45). Appellant by the terms of the participating policy, issued by the appellee to the appellant, participates in the profits as apportioned by the directors of the appellee. The policy recites that beginning at the end of the first policy year dividends shall be declared annually during its continuance and that the current dividend, when due, may be withdrawn in cash, or applied to the payment of the premiums; or left to accumulate with interest compounded annually at 3½% increased from surplus interest earnings as apportioned by the directors until maturity of the policy, subject to withdrawal at any time; or applied to the purchase of paid up participating additions to the policy convertible into cash at any time for the reserve of the additions (R. 3, 4, 5, and 45). The appellee wrote both nonparticipating insurance, that is, insurance in which there were no dividends declarable to policyholders, and participating insurance, in which policyholders shared in the profits of the business in accordance with the provisions found in the respective policies, from the date of its organization in 1867 until September 1, 1907; on September 1, 1907 it discontinued the writing of new business on a nonparticipating basis (R. 63). The appellee declared a stock dividend to its stockholders of $400,000 on June 16, 1908 arising out of the profits of the business of the appel-

lee which had been allowed to accumulate in the surplus of the appellee (R. 46). On May 1, 1916 appellee declared a stock dividend to its stockholders in the amount of $1,500,000 and on February 24, 1919 it declared a further stock dividend to its stockholders in the amount of $500,000. The entire amount of each of said stock dividends arose out of the profits of the nonparticipating business of the appellee which had been allowed to accumulate in the surplus of the appellee. In addition to the stock dividends paid to the stockholders of the company since organization cash dividends have been paid to the stockholders of the company in the sum of $4,285,733; no dividends were declared or paid in the calendar years 1933, 1939, and 1940, but the total cash dividends have averaged 5.18% per annum from 1920 to 1940 (R. 6, 47). The bylaws of the appellee provide that a semi-annual dividend of not to exceed 5% shall be paid on the stock provided that the sum contributed to such dividend out of the profits derived from participating policies shall not exceed in any year one-twentieth (1/20th) of one per cent (1%) of the appellee's assets for the year preceding such dividend; excepting, however that if at any time the funds derived from the nonparticipating business shall not be sufficient when added to the amount so contributed out of the profits of the participating insurance to equal a semi-annual dividend of 3% on the outstanding capital stock, then such deficiency shall be paid out of the profits of the participating insurance, but in no event shall there be paid out of the profits of the participating insurance any dividends to shareholders in excess of 6% per annum. (R. 48).

In 1937 the Ohio Legislature enacted a bill providing for the "conversion of domestic stock life insurance corporation into a mutual life insurance corporation." 117 Ohio Laws 608. In 1941 the Ohio Legislature adopted a new act

for the conversion of domestic stock life insurance corporation into a mutual life insurance corporation. 119 Ohio Laws 235. G. C. Section 9364-1 to 9364-8, both inclusive. It became effective on July 17, 1941.

On July 24, 1941 the board of directors of the appellee adopted a plan of mutualization whereby the appellee would be converted from a stock life insurance company into a mutual life insurance company. The plan provided that each stockholder receive $25.00 for each share held by him and thus that $3,125,000 in cash be paid to the shareholders. (R. 49, 50).

On August 7, 1941 a meeting of the stockholders of the company was held and at such meeting the stockholders approved the plan to pay themselves $3,125,000. (R. 49). Notices were sent to the policyholders of the appellee notifying them of a meeting to be held at the offices of the appellee on October 24, 1941 at ten o'clock A. M. for the purpose of voting on the approval of said plan. (R. 49). On September 26, 1941 the appellant filed his petition in the Court of Common Pleas of Summit County, Ohio, for an injunction. The appellee was duly served with summons on September 27, 1941. At the meeting of October 24, 1941 a motion was made and adopted adjourning the policyholders' meeting until April 30, 1942. At the policyholders' meeting on April 30, 1942 a motion was again made and adopted adjourning the meeting until November 6, 1942. On said last-named date and at the adjourned meeting a motion was made and adopted that the meeting adjourn to meet again at the call of the Superintendent of Insurance of the State of Ohio. No such call has been issued. (R. 49, 50).

Comment Concerning the Mutualization Act and Difficulties in Its Application

The Ohio Insurance Code is in marked contrast to the insurance laws of other states in that at least until 1937 there was a complete lack or absence of any provision dealing in any fashion with the method of organization or management or regulation of mutual life insurance companies. All of its statutory provisions with respect to organization and internal management of insurance companies were aimed only at stock life insurance companies. In states like New York and New Jersey where provisions for organization and internal management of mutual life insurance companies have long been part of the statute law, it is easily possible to change over a stock company to a mutual company. In Ohio, however, where no such provisions have existed, no such change can be effected unless the new act itself sets up the measures and standards by which the mutual life insurance company thus newly created might begin its business and unless it sets up the standards and procedures by which its internal management may be regulated. That is to say, that at the time the appellant became a participating policyholder in the appellee the Legislature had not spoken on the subject of mutualization.

Legislative Prescription for Change-over from Stock Company to Mutual Company

In Section 9364-1 of the General Code of Ohio the Legislature prescribes the manner by which directors, stockholders and policyholders may vote upon the subject of converting a policy from a stock to a mutual plan. The steps are required to be taken in sequence. When the three steps have been taken the fourth condition is that the Superintendent of Insurance of the State of Ohio must

approve the plan of mutualization and the payments made thereunder.

General Code Section 9364-1 (4) is clear and unambiguous insofar as the question of power of the superintendent of insurance is concerned. It tells in no uncertain terms that the fourth requirement of mutualization is the submission of the proposal to and the approval of the plan by the superintendent of insurance, in writing. The rest of the statutory provision is very indefinite. The difficulty with it is that it does not amply protect the policyholder in any plan whereby the shareholders seek to take away from the capital structure that cushion which they created in order to allure policyholders to join their company. The last sentence of General Code Section 9364-1 is indefinite as to the amount of contingent surplus, if any, which a converted company must have and it would frequently be hazardous to the public and to the policyholders if a stock corporation were allowed to buy its shares out of surplus and leave assets equal only to its liabilities plus the minimum surplus required by the insurance code. It is significant to note that the original Ohio mutualization act, 119 Ohio Laws 70, is in identical language with the mutualization act in force in the State of New York in 1937. The Legislature of New York recognized this infirmity when it, in 1939, rewrote its insurance code and enacted Section 199, Article 9A, based upon the former Sections 16 (6), 52(3) and 95, of Chapter 30, title "Insurance Law". The Legislature of Ohio:

1. Failed to state its policy with reference of mutualization of stock life insurance companies.

2. Failed to set upon a standard for the Superintendent of Insurance to follow.

3. Failed to require a finding in the exercise of his authority to authorize the mutualization.

It left to the Superintendent of Insurance the decision as to whether a stock life insurance company should be mutualized. Elsewhere in the insurance code the Legislature carefully set up ratios of assets and liabilities as to guides or standards which the Superintendent must follow in reviewing the financial condition of insurance companies. (Sections 9357, 9362, 9363-1, Ohio General Code). When, however, the Legislature authorized conversion of stock life insurance companies into mutual life insurance companies, it failed and neglected to set out any guides or standards or limits within which the Superintendent of Insurance could exercise discretion. The Superintendent of Insurance, in his sole and unrestricted discretion, was authorized to decide what ratio of assets and liabilities would be good enough to justify converting a stock life insurance company into a mutual life insurance company. In the act of 1937 the Ohio Legislature failed to provide relief for a dissenting stockholder. The 1941 act, 119 Session Laws, page 70, includes Section 9364-2a, which sets up elaborate machinery by which a stockholder not satisfied with the amount to be paid to him for his share under the plan may have an appraisal and secure the amount determined upon such appraisal.

The entire act contains no provision for fixing any compensation to dissenting policyholders. The elaborate provisions for giving compensation to dissenting stockholders stand in direct contrast to the absence of provisions for compensation to dissenting policyholders. Under the statute a dissenting policyholder must go along whether he likes it or not.

Dual Relationship of Participating Policyholder

A policyholder is a creditor of a life insurance company in Ohio. *Hess, Auditor,* v. *The Columbia Life In-*

surance Company, 116 O. S. 416. By contract a participating policyholder participates in the profits as apportioned by the directors of the company. In this last respect he bears the same relationship to the company as a shareholder. *Bell* v. *Union Central Life Insurance Company,* 14 C. C. N. S. 385, affirmed 92 O. S. 523. As far as the profits of the company are concerned all that any shareholder receives from the company are dividends as the directors may declare.

Participating Policyholders Have Vested Rights in the Surplus of the Company. The Stockholders Have No Rights in the Surplus of The Union Central Life Insurance Company.

The appellee's stockholders have voluntarily imposed a limitation upon their right to participate in earnings of the company. Bylaws adopted by the stockholders recite that not more than 6% per annum may be paid to stockholders out of earnings on participating policies. In 1907 the company determined to issue only participating policies and all policies issued since 1907 have been participating policies. Prior to 1907 the company issued non-participating policies. Litigation in the Ohio courts as to the issuance of the stock dividends indicates that not only were all the earnings on non-participating policies issued prior to 1907 used up, but that actually some of the earnings made on participating policies issued both before and after 1907 and made part of the surplus, had to be invaded to find funds against which to charge part of the stock dividends issued. *Bell* v. *Union Central Life Insurance Company,* 14 C. C. N. S. 385; *State ex rel. Ellis* v. *Union Central Life Insurance Company,* 13 C. C. N. S. 49.

It is plain, therefore, that the maximum amount which appellee can pay to its stockholders in any one year is

6% of its capital of $2,500,000, or $150,000. The company's bylaws, adopted in 1907, gave stockholders maximum, not minimum, rights and gave those rights to them in annual periods. The bylaw gives no right to carry-overs. If dividends of less than 6% were declared and paid in any year the company could not, in a subsequent year, declare earnings to balance the earlier deficiency.

It follows irresistibly that the stockholders now have no right or interest whatever in the present surplus of the company. Our situation is identical with the case of *Spinks* v. *United States Life Insurance Company*, 96 S. W. 889 (Kentucky), 13 L. R. A. N. S. 1053; appeal to the United States Supreme Court dismissed, 209 U. S. 539.

The mutualization plan for the appellee requires not only a return of capital but an invasion of the surplus. The company's claim, therefore, must be that the Ohio Mutualization Act authorizes it to pay over to stockholders $625,000 out of a surplus in which we have demonstrated the stockholders have no right or interest, but which belongs wholly and only to policyholders and in which their rights have vested.

The state law relied on by the company is thus found to be a law which takes property belonging to policyholders and gives it to stockholders; that the property of policyholders is thus appropriated or taken from them without due process of law is, of course, an inescapable conclusion.

The Supreme Court of Ohio failed to pass upon or decide the claim of the policyholder that he had a vested right to the entire surplus of the company. The claim of the policyholder that the company's limitation on the amount of dividends operates to make all earnings in excess of declared dividends (which have passed to surplus) the property of participating policyholders was not decided by the Supreme Court of Ohio although argued before it. The question of

taking policyholders' property without compensation to them was accordingly not passed upon by the Supreme Court of Ohio.

Impairment of Contract

Participating policyholders in the appellee possess many vested rights growing out of the uniform participating contract of insurance such as possessed by the appellant and all other policyholders of the appellee which would be impaired if the appellee is converted from a stock life insurance company to a mutual life insurance company and its capital and surplus to the extent of $3,125,000 would be given to its stockholders.

In a stock life insurance company the policyholder is not a member of the corporation. He is an insured only and owes obligations to no one except to pay his premiums to the corporation when due. Payment of the amount owed him on his policy is secured by the entire capital structure of the corporation, that is, by the cash premiums currently received by the company, and by its entire assets, including its surplus, its reserves *and the capital* represented by the capital stock. He is responsible for no losses and can not be affected by losses of the corporation until all surplus and capital have been exhausted. The policyholder is entitled to participate in profits after dividends have been declared (not in excess of 6%) to stockholders, but only as apportioned by the directors. He participates in no losses until the entire capital is wiped out. In the event of insolvency, a policyholder (whether his claim has matured or not) is regarded as a creditor of the company and participates rateably in distribution of its assets along with other creditors.

In this appellee, after it has been mutualized by the Ohio statute, the policyholder will have only certain residual rights. He will be both an insurer and insured. He will

owe obligations to every other member of the company just as every other member of the company will owe an obligation to him. Payment of the amount upon his policy will be secured only by the premiums and assets, including reserves and that part of the surplus which was not invaded by the stockholders in order to carry out their plan. The entire capital and part of the surplus will have been removed through payment of $3,125,000 to the stockholders and that security will be gone. The chances of appellee making earnings and profits will be diminished by reason of the removal of $3,125,000 from the capital structure of the company and the possibility of losses will be increased by reason of the reduction of working capital by $3,125,000. This is of vital effect to the policyholder because he "participates" in the losses as well as in the profits.

At the time the appellant bought his participating contract of insurance his investment was safeguarded by the cushion of the capital and surplus. Surely life insurance companies should not be able to secure policyholders upon the theory that their investment will be safeguarded by the cushion of the capital and surplus and then, after the investment has been made, permitted to repudiate their contract by paying out the capital structure to the stockholders to the extent that the capital structure is depleted by the entire capital account plus a substantial part of the surplus account. This would amount not only to depriving the policyholders of their property without due process of law but would result in an impairment of the obligation of their contract.

This Court, from a very early time, has been jealous of protecting the obligation of contracts from all legislative action tending to their impairment. It has not allowed the act of a legislature to alter the nature and the legal effect of an existing contract to the prejudice of either party. It has stated on numerous occasions the inviolability of con-

tracts and the duty of performing them as made are at the foundation of all well ordered society and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed and that it is one of the highest duties of this Court to take care that the prohibition should neither be evaded nor frittered away. The obligation of the contract in this case was the law or duty which bound the parties to perform their agreement conformably to the laws which subsisted at the time and place of making the contract. The obligation of the contract is measured by the standard of the laws in force at the time it was entered into and its performance is to be regulated by the terms and rules which they prescribe. At the time the appellant purchased his participating insurance policy contract the Legislature of Ohio had not spoken with reference to mutualization and he should not now be compelled to go along with a plan which he could not have anticipated or had not consented to.

The amount or extent of the impairment is immaterial. Any act which in any degree, no matter how slightly, modifies the obligation of the contract by attempting to relieve one party from any duty by the contract assumed is repugnant to the constitutional prohibition against the impairment of the obligation of contract. Here, in addition to altering the nature and legal effect of the policy contract, the contract has been impaired in that its value by legislation has been diminished. If the appellee is allowed to consummate its plan property belonging to the policyholders will be taken away from them and given to the stockholders.

The decision of the Supreme Court of Ohio is without substantial support. The indication from Syllabus 7 is that the Court thinks this case was prematurely brought. This point was not argued in the briefs of the appellants or the appellee. It was argued in the Court of Appeals but not

made a part of its judgment and hence no review as to that point was sought by either side.

It is admitted in the Record that four steps must be taken before a mutualization plan can become effective. Two of these steps have already been taken. A third was in progress when the action was brought and was not completed only because of the pendency of this cause. The approval of the Superintendent of Insurance had not yet been affirmatively bestowed but is recognized as available to the company if for no other reason than that he, the superintendent, was the presiding officer at the meeting of the policyholders. The chances are that the Superintendent of Insurance would not consent to preside at a meeting of the policyholders to consider a plan to which he had any objection. The appellant was confronted with this situation and he had the right to assume that the Superintendent of Insurance would approve the plan.

The appellee admitted in its Answer (R. 50) that if the plan would be approved it would proceed to the consummation thereof by purchasing its entire capital stock at $25.00 per share and paying the sum of $3,125,000 therefor. Accordingly, the only gap between effectively placing $3,125,000 in the hands of the stockholders of the appellee was the single piece of paper bearing thereon the signature of the Superintendent of Insurance.

Had the appellant waited until the superintendent had signed the piece of paper he might have found himself in the same situation as the plaintiff in the case of *Myer* v. *O'Dwyer*, 90 O. S. 341, where the licenses sought to be enjoined by the petition had already been issued before the petition was filed.

The purpose of an injunction is to prevent future mischief. Rights already lost and wrongs already perpetrated can not be corrected by injunction. It is elementary in Ohio

that an injunction may be obtained to prevent an irreparable injury even though no such injury has yet occurred. This principle was recognized in the early case of *MacArthur* v. *Kelly*, 5 Ohio 140.

In this cause the Petition alleges and the Answer admits that the appellee has passed the threatening stage of this proceeding and is well along in the process of consummating the plan of mutualization. The "reasonable probability of injury" is at hand. This principle has been followed by the Supreme Court of Ohio in the case of *Newton* v. *Mahoning County*, 26 O. S. 618, and *Reemelin* v. *Mosby*, 47 O. S. 570. In the case of *Royal Trust Company* v. *Equitable Life Insurance Society of the United States*, 247 Federal 437, the Circuit Court of Appeals for the Second Circuit had before it the objection that the suit was premature because the plan might never be carried out. Circuit Judge Ward, speaking for the Court, at page 440, said:

> "The defendant objects that the suit is premature because the plan may never be carried out; the policyholders may not vote for it and if they do, the superintendent of insurance may not approve it. But the injury complained of is not only threatened but the proceeding to accomplish it is actually under way. The complainants are not obliged to wait until it is consummated before asking for relief. If their contentions are right, equity should protect them by injunction."

We urge this Court to follow this principle in your consideration as to whether this suit is prematurely brought.

We, therefore, submit that we have shown the existence of contract rights and the nature and extent of the obligations of said contract and particularly the manner in which the obligations of that contract have been impaired and that the appellant is about to be deprived of his property without due process of law.

This is an important matter which ought to be settled b this Honorable Court and is of great public interest becaus it adversely affects more than 200,000 policyholders of th appellee residing in forty-six (46) of the United States an other stock life insurance companies who are contemplatin mutualization.

The question presented by this record is substantial i character because neither this court nor the Supreme Cour of Ohio nor the court of last resort of any other of th United States has passed upon the constitutionality of stat utes providing for the conversion of stock life insuranc corporations into mutual life insurance corporations by th adoption of a mutualization plan similar to that provide by the General Code of Ohio.

We, therefore, request that you analyze the facts averre in appellant's Petition and Amendment to his Petition an the appellee's Answer, independent of the conclusio reached by the Supreme Court of Ohio in this respect i your determination whether a federal right has bee wrongly denied.

Respectfully submitted,

CHARLES F. SCHNEE,
ROBERT GUINTHER,
Attorneys for Petitioner.

APPENDIX "A"

(Amended Senate Bill No. 235)

An Act

To revise the laws relating to the conversion of stock life insurance corporations into mutual life insurance corporations and for that purpose to amend sections 9364-1, 9364-2 and 9364-3 of the General Code, and to enact sections 9364-2a, 9364-2b, 9364-4, 9364-5, 9364-6, 9364-7 and 9364-8 of the General Code

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That section 9364-1, 9364-2 and 9364-3 of the General Code be amended and sections 9364-2a, 9364-2b, 9364-4, 9364-5, 9364-6, 9364-7 and 9364-8 of the General Code be enacted to read as follows:

Sec. 9364-1. Any domestic stock life insurance corporation, duly incorporated under a general law, may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock, provided, however, that such plan: (1) shall have been adopted by a vote of a majority of the directors of such * * * *corporation;* (2) shall have been approved by a vote of stockholders representing a majority of the capital stock then outstanding at a meeting of stockholders called for the purpose; (3) shall have been approved by a majority of the policyholders voting at a meeting, called for the purpose, of policyholders each insured in at least one thousand dollars and whose insurance shall then be in force and shall have been in force for at least one year prior to such meeting; *the term "policyholder" as used herein shall be deemed to mean the person insured under an individual policy of life insurance, and the person to whom any annuity or pure endowment is presently or prospectively payable by the terms of an individual annuity or pure endowment contract, except where the policy or contract declares some other person to be the owner or holder thereof, in which case such owner or policyholder shall be deemed the policyholder, and*

except in cases of assignment as hereinafter provided: in the case of any individual policy or contract insuring two or more persons jointly, the persons insured, or in case the policy or contract declares two or more persons to be the owner, the persons insured or the persons so declared to be the owner shall be deemed one policyholder for the purposes hereof; in case any such policy or contract shall have been assigned by an assignment absolute on its face to an assignee other than the corporation, and such assignment shall have been filed at the principal office of the corporation at least thirty days prior to the date of said meeting, then such assignee shall be deemed a policyholder within the meaning hereof; except as provided herein, an assignee of a policy or contract shall not be deemed to be a policyholder within the meaning hereof; the reference herein to insurance in the amount of $1000 or more shall be deemed to include any annuity contract, the commuted value of which is $1000 or more on the date of said meeting, and any pure endowment contract for the principal sum of $1000 or more; notice of such meeting shall be given by mailing such notice from the home office of such corporation at least thirty days prior to such meeting in a sealed envelope postage prepaid addressed to such policyholders at their last known post office addresses, provided, that personal delivery of such written notice to any policyholder evidenced by written receipt therefor may be in lieu of mailing the same, and such meeting shall be otherwise provided for and conducted in such manner as shall be provided in such mutualization plan; provided, however, that policyholders may vote in person, by proxy or by mail; that all votes shall be cast by ballot on a uniform ballot furnished by the * * * *corporation,* and the superintendent of insurance shall supervise and direct the method and procedure of said meeting and appoint an adequate number of inspectors to conduct the voting at said meeting who shall have power to determine all questions concerning the verification of the ballots, the ascertainment of the validity thereof, the qualifications of the voters, and the canvass of the vote, and who shall certify to the superintendent of insurance and to the corporation the result thereof, and with respect thereto shall act under such rules

and regulations as shall be prescribed by the superintendent of insurance; that all necessary expenses incurred by the superintendent of insurance shall be paid by the corporation as certified to by him; and (4) shall have been submitted to the superintendent of insurance and shall have been approved by him in writing; provided that every payment for the acquisition of any shares of the capital stock of such corporation, the purchase price of which is not fixed by such plan, shall be subject to the approval of the superintendent, and provided that neither such plan, nor any such payment, shall be approved by the superintendent unless at the time of such approvals, respectively, the corporation, after deducting the aggregate sum appropriated by such plan for the acquisition of any part or all of its capital stock, and in the case of any payment not fixed by such plan and subject to separate approval as aforesaid after the approval of such plan, after deducting also the amount of such payment, shall be possessed of assets sufficient to maintain its deposit theretofore made with the superintendent of insurance and not less than the entire liabilities of the corporation, including the net values of its outstanding contracts computed according to the standard adopted by the corporation under the provisions of section 636 of the General Code of Ohio, and also all funds, contingent reserves and surplus save so much of the latter as shall have been appropriated or paid under such plan.

Sec. 9364-2. If a stock life insurance corporation shall determine to become a mutual life insurance corporation, it may, in carrying out any plan to that end under the provisions of the preceding section, acquire any shares of its own stock by gift, bequest or purchase. Until all of such shares are acquired, any shares so acquired *or acquired pursuant to the provisions hereinafter made concerning dissenting stockholders* shall be acquired in trust for the • • • corporation as hereinafter provided and shall be assigned and transferred on the books of the corporation to not less than three nor more than five trustees and be held by them in trust and be voted by such trustees at all corporate meetings at which stockholders have the right to vote, until all of the capital stock of such corporation

is acquired when the entire capital stock shall be retired and cancelled and thereupon, the corporation shall be and become a mutual life insurance corporation without capital stock. * * *

Sec. 9364-2a. If a stockholder of the corporation shall file with the corporation, prior to or at the meeting of the stockholders at which the plan is submitted to a vote, a written objection to such plan and shall not vote in favor thereof, and such stockholder within twenty days after the plan is approved by such meeting shall make written demand on the corporation for payment of the fair cash value of his shares as of the day prior to the date on which such plan is approved by the stockholders, excluding from such fair cash value any appreciation or depreciation in consequence of such mutualization, such stockholder shall be entitled to receive within ninety days after such fair cash value is agreed upon or determined, upon surrender of his certificate or certificates representing his shares, such fair cash value thereof. Any stockholder who fails to make such objection or having objected fails to make demand within the twenty day period shall be conclusively presumed to have consented to the plan and shall be bound by the terms thereof.

Any such objection and demand for the payment of the fair cash value of shares shall state the number and kind of shares held by the dissenting stockholder making the demand, and the amount which such stockholder claims is such fair cash value.

The right of a dissenting stockholder to be paid the fair cash value of his shares shall cease if and when the corporation for any reason and in accordance with the provisions hereinafter set forth shall abandon the plan to mutualize the corporation.

No demand for payment of such fair cash value may be withdrawn by the stockholder making the same unless the corporation, by its board of directors, shall consent to such withdrawal.

Within ten days after the receipt of any such demand the corporation shall inform such stockholder in writing whether or not it will pay the demanded amount, and, if it

refuses to pay such amount, it shall offer in writing to pay an amount as and for such fair cash value.

If, within thirty days after the date of the written demand mentioned in the preceding paragraph, the value of such shares is agreed upon between the dissenting stockholder and the corporation and such value is approved by the superintendent of insurance, payment therefor shall be made within ninety days after the date of such agreement upon the surrender of his certificate or certificates representing such shares. Upon payment of the agreed value the dissenting stockholder shall cease to have any interest in such shares and shall cease to be a stockholder in the corporation but the shares previously held by him and upon which he has been paid such fair cash value shall be transferred to and held by the trustees appointed hereinafter provided for the benefit of the corporation.

If, within such period of thirty days, the stockholder and the corporation do not so agree, the corporation, or the dissenting stockholder if he has complied with all the conditins of this section, may within sixty days after the expiration of the thirty day period, petition the court of common pleas of the county in which the principal office of the corporation is located, to determine the fair cash value of the shares mentioned in such demand as of the day before the vote was taken approving such plan.

If such petition is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenting stockholder by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting stockholder as above provided.

Such petition shall contain a brief statement of the facts and shall show the vote and action objected to and facts entitling such dissenting stockholder to the relief demanded.

Upon the filing of such petition, the court of common pleas, on the motion of the petitioner, shall enter an order fixing a date for hearing, and requiring a notice of the filing and prayer of such petition and of the date for hearing to be given to the respondent or defendant in the manner in

which a summons is required to be served or substituted service is required to be made in other cases.

On the day fixed for the hearing of such petition, or any adjournment thereof, the court shall determine from the petition and such evidence as may be submitted by either party whether the dissenting stockholder is entitled to be paid the fair cash value of any share or shares, and, if so, the number of such shares, and if the court shall find and order that such stockholder is entitled to be paid the fair cash value of any number of shares, the court shall appoint three appraisers to determine the fair cash value of such number of shares as of the day before the vote so objected to was taken, excluding from such fair cash value any appreciation or depreciation in consequence of such mutualization or such vote, and said court shall further instruct said appraisers respecting their duties in making such determination.

Said appraisers shall forthwith proceed to determine said fair cash value and said appraisers, or a majority of them, shall make a report or award within ten days, unless the court shall enlarge said time, and shall file such report in the office of the clerk of such court, whereupon, on the motion of either party, said report shall be submitted to the court and considered on such evidence as the court may consider relevant, and if said award shall be found to be reasonable, and shall be confirmed and approved by the court, judgment shall be rendered against the corporation for the payment of the amount of the award, with interest at six per cent from a date which shall be fixed in such judgment.

If such appraisers, or a majority of them, shall fail to make and file an award within ten days, or within such further time as may be fixed by the court, or the award shall not be confirmed by the court, it shall summarily determine the fair cash value of said number of shares and render judgment therefor.

Any judgment shall further provide that simultaneously with the payment thereof the certificate evidencing the shares of stock affected thereby shall be surrendered to the corporation and upon the failure of the holder thereof to

so surrender such certificates the judgment shall stand as a cancellation of such certificates.

The costs of the proceedings, including reasonable compensation to the appraisers to be fixed by the court, shall be assessed or apportioned as the court may consider equitable.

Such a proceeding shall be deemed to be a special proceeding within the meaning of section 12223-2 of the General Code, and final orders therein may be reviewed, affirmed, modified or reversed as provided in title V, part third, of the General Code.

Two or more dissenting stockholders may join as plaintiffs or be joined as defendants in any such proceeding, and two or more such proceedings may be consolidated.

A stockholder who so objects in writing and demands in writing payment of the fair cash value of any shares shall not be entitled to vote such shares or to exercise any rights respecting such shares or to receive any dividends or distributions thereon, unless and until the plan of mutualization shall, for any reason, be abandoned, or, with the consent of the corporation, the objection and demand shall be withdrawn; provided that if, prior to such abandonment dividends shall be paid in money to stockholders of the same class as those dissenting and who are of record on or after the day on which the vote was taken authorizing such mutualization, then and at such times an amount of money equal to the dividends otherwise payable upon such dissenting shares shall be paid to the holders of record thereof who would, except for such dissent, be entitled to receive such dividends, and each such payment shall be a credit upon the total amount to be paid for such shares by or on behalf of the corporation. All the holders of such dissenting shares of record at the time of any such abandonment, shall thereupon be restored to the status of a stockholder; and any of such payments theretofore made on such shares shall be deemed to have been dividends thereon.

Any stockholder who has assented to the plan or who has been concluded by the vote of the assenting stockholders, and any stockholder who has objected and made demand in writing for the fair cash value of his shares sub-

sequent to which an agreement has been reached fixing such fair cash value but who fails to surrender his certificates for cancellation upon payment of the amount to which he is entitled may be ordered to do so by a decree of the court of common pleas for the county in which the principal office of such corporation is located after notice and hearing in an action instituted by the corporation for that purpose and such decree may provide that upon the failure of such stockholder to surrender such certificates for cancellation such decree shall stand in lieu of such surrender and cancellation.

At any time before there has been a vote of the policy holders approving such plan the corporation may abandon a plan of mutualization by the same vote of the directors and of the stockholders as was required for the adoption of such plan. Upon such abandonment the rights of any stockholders to be paid for their stock in accordance with the plan, and the rights of any dissenting stockholders to be paid the fair cash value of their stock whether or not judgment may have been rendered therefor shall cease and terminate and the corporation shall continue to conduct its business as a domestic stock life insurance corporation as though no plan of mutualization had ever been adopted.

Sec. 9364-2b. The trustees provided for in section 9364-2 shall be appointed and vacancies shall be filled by the superintendent of insurance. Such trustees shall be duly qualified directors of the corporation at the time of such appointment and shall continue as such trustees until the purpose of this trust is accomplished or abandoned unless removed for cause by the superintendent of insurance. Said trustees shall file with the superintendent of insurance a duly verified acceptance of their appointment and declaration that they will faithfully discharge their duties as such trustees. Such trustees shall give and file with the superintendent of insurance bonds in such an amount as under the circumstances the superintendent of insurance deems just and proper with sureties thereon approved by the superintendent of insurance. All dividends and other sums received by said trustees on the shares of stock held by them shall be immediately repaid to said corporation.

The necessary expenses of executing the trust shall be paid by the corporation. All shares held by such trustees shall be deemed admitted assets of such corporation at their par value.

Neither the retirement of its capital stock nor the amendment of its articles of incorporation, as herein provided, shall affect existing suits, rights or contracts of such corporation. The deposit of one hundred thousand dollars in securities and/or mortgages made by such corporation pursuant to section 9346, General Code, shall be retained by the superintendent of insurance in trust for the benefit and security of all of the members and policyholders of such corporation.

Sec. 9364-3. When a stock life insurance corporation has become converted into a mutual life insurance corporation as herein provided, the officers and directors or trustees of the original corporation so converted shall remain as the officers and directors or trustees of the newly converted corporation until the next annual meeting for the election of officers and directors or trustees, when their successors shall be elected in the manner provided • • • *articles of incorporation* and • • • *code of regulations* by said corporation theretofore adopted.

Sec. 9364-4. The corporate powers of a domestic mutual life insurance corporation shall be exercised by, and its business and affairs shall be under the control of, a board of directors or trustees composed of not less than three nor more than twenty-one natural persons who are policyholders or members and who are at least twenty-one years of age and at least three of whom are residents of this state.

Sec. 9364-5. In order to secure continuity of membership in its board of directors or trustees, the articles of incorporation of any such corporation may provide for division of the board into not more than three classes as nearly equal in number as possible and fix the term of office for each class. Unless such provision is made in the articles of incorporation all directors and trustees shall be elected annually.

Sec. 9364-6. Meetings of the board of directors or trustees shall be upon such notice as the code of regulations may prescribe. Attendance of a director or trustee at any meeting shall constitute a waiver of notice of such meeting except where a director or trustee attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors or trustees need be specified in the notice or waiver of notice of such meeting.

Sec. 9364-7. If the code of regulations so provides, the board of directors or trustees, by a resolution adopted by a majority of the whole board, may designate three or more of their number to constitute an executive committee, which committee shall, to the extent provided in the resolution or in the code of regulations, have and exercise, during the interim between the meetings of the board, all of the authority of the board in the management of the corporation, but the designation of such committee shall not relieve the board or any member thereof of any responsibility imposed by law.

Sec. 9364-8. (a) The code of regulations of any such corporation shall provide that each policyholder of the corporation shall be a member of the corporation. The term policyholder as used herein shall be deemed to mean the person insured under an individual policy of life insurance, the person to whom any annuity or pure endowment is presently or prospectively payable by the terms of an individual annuity or pure endowment contract, except where the policy or contract declares some other person to be the owner or holder thereof, in which case such owner or policyholder shall be deemed the policyholder, and except in cases of assignment as hereinafter provided. In the case of any individual policy or contract insuring two or more persons jointly, the persons insured, or in case the policy or contract declares two or more persons to be the owner, the persons so declared to be the owner shall be deemed one policyholder for the purposes hereof. In case any such

policy or contract shall have been assigned by an assignment absolute on its face to an assignee other than the corporation, and such assignment shall be filed at the principal office of the corporation, then such assignee shall be deemed a policyholder within the meaning hereof, but for the purpose of determining voting rights such assignment shall not be effective until thirty days after it shall have been filed with the corporation. Except as provided herein an assignee of a policy or contract shall not be deemed to be a policyholder within the meaning hereof.

Such code of regulations shall provide that each policyholder insured in at least $1000.00, or holder of an annuity, which at normal date of maturity requires the payment of $100.00 or more annually, and whose insurance or contract of annuity shall then be in force and which has been in force for at least one year prior to a policyholders' meeting, shall be entitled to one vote only irrespective of the number of policies or contracts held by him or the amount thereof.

(b) The power to make, alter, amend or repeal the code of regulations shall be vested in the board of directors or trustees unless reserved to the members by the articles of incorporation.

(c) The code of regulations of a mutual legal reserve life insurance corporation shall provide that such corporation shall issue no policy of life insurance or annuity contract which provides for the payment of any assessment by any policyholder or member in addition to the regular premium charged for such insurance or annuity.

Section 2. That sections 9364-1, 9364-2 and 9364-3 of the General Code be, and the same are hereby repealed.

APPENDIX "B"

BELDEN, APPELLANT, *v.* THE UNION CENTRAL LIFE INS. CO., APPELLEE.

KOPLIN, APPELLANT, *v.* THE OHIO NATIONAL LIFE INS. CO., APPELLEE.

Constitutional law—General Assembly may not abdicate or transfer legislative functions—Section 1, Article II, Constitution—Corporations—General Assembly authorized to provide for forming or changing corporations—Legislative power not delegated by General Assembly, when—Permitting administrative agencies to make subordinate rules—Legislative act may be unconstitutional because of operative effect—Constitutionality determined from provisions of act, without regard to extrinsic facts—Burden on party challenging constitutionality of act—To present clear and convincing evidence of existing facts rendering act unconstitutional—Constitutional questions not decided until necessity arises upon record before court.

1. The legislative power of the state is vested in the General Assembly by Section 1, Article II of the Constitution and that body may not abdicate or transfer to others the essential legislative functions with which it it vested.

2. Section 2, Article XIII of the Constitution grants full and complete authority to the General Assembly to provide, by general laws, for the formation of corporations and changes in the organization or structure of existing corporations.

3. It is no violation of the constitutional inhibition against the delegation of legislative power for the General Assembly to establish a policy and fix standards for the guidance of administrative agencies of government while leaving to such agencies the making of subordinate rules within those fixed standards and the determination of facts to which the legislative policy applies.

4. A legislative act may be unconstitutional upon its face, or it may be valid upon its face but unconstitutional because of its operative effect upon a particular state of facts.

5. Where the constitutionality of an act is challenged upon the ground that the General Assembly has delegated legislative power, that question will be determined by considering the provisions of the act itself without regard to extrinsic facts.

6. Where an act is challenged on the ground that it is unconstitutional when applied to a particular state of facts, the burden rests upon the party making such attack to present clear and convincing evidence of a presently existing state of facts which makes the act unconstitutional and void when applied thereto.

7. Constitutional questions will not be decided until the necessity for such decision arises upon the record before the court. (*State, ex rel. Herbert* v. *Ferguson, Aud.*, 142 Ohio St., 496, approved and followed.)

(Nos. 29621 and 29622—Decided May 24, 1944.)

Appeals from the Court of Appeals of Summit county.

These are suits in equity brought by insured persons against their insurers. The relief sought is a permanent injunction to prevent each of the defendants from converting itself from a stock life insurance company into a mutual life insurance company under a plan adopted for that purpose by each company under the claimed authority of an act of the General Assembly (Sections 9364-1 to 9364-8, both inclusive, General Code).

The original basis of the claimed right to injunctive relief in the case of *Belden et al.* v. *The Union Central Life Insurance Company* hereinafter called Union Central, is that the operative effect of that act, as applied to the plan of mutualization, renders it unconstitutional and void under the Constitution of the United States, in that the obligation of contracts between Union Central and its policyholders is impaired and that the policyholders are deprived of their property without due process of law. In the case of *Koplin et al.* v. *The Ohio National Life Insurance Company* hereinafter called Ohio National, the additional claim was presented, by virtue of the amendment to the petition in the Common Pleas Court, that the act was unconstitutional and void on its face.

The pleadings are quite voluminous and, therefore, of their many allegations, sufficient only will be noted to make comprehensible the questions presented.

In the *Belden case* it is alleged in the petition that the plaintiff brings the action for himself and on behalf of all other policyholders similarly situated; that the policyholders of Union Central exceed 200,000 in number, some of whom reside within and some without the state of Ohio; that it is impracticable to bring them all before the court; that on October 8, 1931, Union Central issued and delivered to plaintiff a policy in the sum of $5,000, insuring his life in consideration of the payment of certain premiums in the manner and at the times stated in the policy; that he has kept and performed all the terms and conditions of the contract; that the policy was, on the date of the filing of his petition, in full force and effect; and that under the terms of the policy it is provided that the plaintiff shall participate in the profits as apportioned by the directors and that at the end of the first year, provided the policy is in full force and effect, dividends shall be declared annually during the continuance of the life of the policy, which dividends may be withdrawn in cash or applied to the payment of premiums, or left to accumulate, compounded annually at the rate of three and one-half per cent, subject to withdrawal at any time.

It is also alleged that Union Central was incorporated under the laws of the state of Ohio in 1867 and commenced business in that year as a stock life insurance company with an authorized capital stock of 5,000 shares of a par value of $20 each; that in 1908 by an amendment to its articles of incorporation the capital stock was increased from $100,000 to $500,000 and a stock dividend of $400,000 of fully paid-up shares was declared and paid to its shareholders; that in 1916, by a further amendment, the authorized capital was increased to $2,500,000 and at the same time a stock dividend of $2,000,000 of fully paid-up shares of Union Central was declared and paid to its shareholders, bringing about a net result of there having been paid to its shareholders as dividends the sum of $2,400,000 in paid-up stock and $4,285,733 in cash dividends; that on July 25, 1941,

the board of directors passed a resolution adopting an alleged plan of mutualization whereby Union Central would be converted from a stock life insurance company into a mutual life insurance company, and to consummate such plan all its shares of capital stock would be purchased from the shareholders at $25 per share; also empowering its proper officers and agents to do any and all acts necessary to carry the proposed plan into execution; that on August 7, 1941, such plan was approved by the shareholders and a notice was given to the policyholders of a proposed meeting on October 24, 1941, for the purpose of allowing such policyholders to exercise their right of approval of the plan and if the majority of the policyholders approved, the plan was to be submitted to the Superintendent of Insurance of the state of Ohio, hereinafter called superintendent, for his approval; that these acts were being done under the provisions of Sections 9364-1 to 9364-8, both inclusive, General Code; that if the alleged plan of mutualization, under the circumstances alleged in the petition, is allowable "said statute is unconstitutional, null and void because it is repugnant to the First Amendment of the Constitution of the United States and repugnant more particularly to that clause of said amendment [Section 10, Article I] which provides that no state shall pass any law impairing the obligation of contracts"; and that this plan of mutualization does impair the obligation of the contracts between Union Central and its policyholders.

The petition also contains allegations in considerable detail relative to the financial setup of Union Central, and alleges that the diversion of upwards of $3,125,000 from the capital and surplus to buy the outstanding shares of the capital stock from the shareholders would amount to the taking of property of the policyholders without due process of law.

The prayer of the petition is for an injunction to prevent Union Central from taking any further steps which may be necessary to carry out the proposed plan.

The answer of Union Central admits the allegations of the petition with reference to the number of policyholders and the date of organization; denies that the original authorized capital stock was $100,000; alleges the fact to be

that the original capital stock was $500,000, consisting of 25,000 shares each of a par value of $20 and that 5,000 shares totaling $100,000 were subscribed and paid for in cash at the time the business was commenced; denies that at the time of the increase of the authorized capital from $500,000 to $2,500,000, a stock dividend of $2,000,000 of fully paid-up shares was declared; alleges that the entire amount of each of the stock dividends arose out of the profits from non-participating business, which were allowed to accumulate as a surplus; sets forth the gain and loss exhibits as filed with the Department of Insurance, between the years 1920 and 1940; quotes the bylaws with reference to dividends; admits the allegations with reference to the adoption of a plan of mutualization, the action of the board of directors with reference thereto and approval of the plan by the shareholders at the time and place set forth in the petition; admits that the notice was given to the policyholders; avers that the meeting of the policyholders was postponed and that the policyholders and the superintendent have not as yet approved the plan; admits that the plan was prepared under and by virtue of the provisions of the General Code set forth; denies that the statute is unconstitutional and void under any of the provisions of the federal Constitution; admits a few and denies many of the allegations with reference to the financial setup of Union Central; admits that it proposes, if the plan is approved, to buy the outstanding shares of capital stock at $25 per share, but denies that the payment of $3,125,000 for the outstanding capital stock would amount to the taking of property of the policyholders without due process of law or would impair the obligation of the contract with any policyholder.

The answer contains detailed allegations relative to the financial position of Union Central, in conflict with the allegations of the petition; alleges that the action is prematurely brought and that the plan of mutualization cannot be carried out unless approved by a majority of the policyholders and, thereafter, by the superintendent; and prays that the petition be dismissed.

In the *Koplin case* the petition alleges that Ohio National was organized as a stock life insurance company under the laws of Ohio on September 9, 1909, and still exists as such;

that on February 4, 1927, it executed and delivered to Koplin a policy of insurance upon his life in the amount of $2,000 in consideration of the payment of certain premiums in the manner and at the time therein stated; that Koplin has performed all the terms and conditions upon his part to be performed; that the policy is now in full force and effect; that the policy is a non-participating policy, but upon certain terms and conditions the policy may be exchanged for a participating policy; that Ohio National began business on September 23, 1910, as a stock life insurance company with an authorized capital stock of $100,000 evidenced by 10,000 shares of stock of a par value of $10 each; that the capital stock was fully subscribed and paid for at the time of the commencement of business; that various increases in the authorized capital stock have been made and on December 31, 1940, there were 82,858 shares outstanding and the paid-in capital was $828,580; that since 1920 the shareholders have received regular dividends which since the organization of Ohio National have amounted to $1,353,836 in cash; that on June 12, 1941, the board of directors adopted a resolution providing an alleged plan of mutualization whereby Ohio National would be converted from a stock life insurance company into a mutual life insurance company; that under the plan all the shares of the capital stock of Ohio National would be purchased from the shareholders at the price of $40 per share; that on July 30, 1941, the plan was approved by the shareholders; that Ohio National had given notice of a proposed meeting of the policyholders on October 30, 1941, for the purpose of voting upon the approval of the plan and if a majority of the policyholders approved the plan, it would then be submitted to the superintendent for his approval; that it would require an expenditure of $3,314,320 in order to purchase the 82,858 shares of capital stock at $40 per share; and that the plan was being submitted under the provisions of Sections 9364-1 to 9364-8, both inclusive, General Code.

The financial setup of Ohio National is alleged in some detail in the petition which also alleges that the payment of $3,314,320 from the assets of Ohio National will not only wipe out the amount set up on its books in the capital and

surplus account, but would cut into the policy reserves account to the extent of more than $1,000,000 and would amount to the taking of the property of the policyholders without due process of law and would impair the obligation of the contracts with the policyholders; and that the stock is not now, and for many years last past has not been, worth $40 per share.

The prayer of this petition is identical with the prayer of the petition in the *Belden case.*

The answer of Ohio National admits that it was organized as a stock life insurance company and was licensed to do business in the states alleged in the petition; that the plaintiff is the owner and holder of a life insurance policy in the amount of $2,000; that the policy contains the terms and conditions set forth; that Ohio National commenced to do business at the time alleged; that its present capital stock is as therein stated; that the allegations relative to the payments of dividends are correct; and that a plan of mutualization whereby Ohio National would be converted from a stock life insurance company into a mutual life insurance company has been adopted by the directors and shareholders, whereby, among other things, the board of directors is authorized to purchase from time to time as funds are available the stock of the shareholders at a price of $40 per share. It is also alleged that since the filing of the petition the plan has been duly approved by a majority of the policyholders as required by law. Each and every other allegation of the petition is denied.

To each answer the respective plaintiffs filed a general demurrer upon the ground that the answer "on its face is insufficient in law."

After the filing of the demurrer in the *Koplin case* the plaintiff obtained leave and filed an amendment to his petition as follows:

"Plaintiff further says that the board of directors and the stockholders of this defendant adopted said alleged plan of mutualization and are submitting it to the policyholders and the Superintendent of Insurance of the state of Ohio under and by virtue of Sections 9364-1 to 9364-8, both inclusive, of the General Code of Ohio, and that if said sec-

tions of the General Code of Ohio allow the alleged plan of mutualization to be consummated under the terms and conditions set forth in said alleged plan of mutualization and under the circumstances hereinafter alleged, said sections of the General Code of Ohio are unconstitutional, null and void because they are repugnant to Article II, Sec. 1 of the Constitution of the state of Ohio, in that they amount to a delegation of legislative power to the Superintendent of Insurance and confer upon him discretion without establishing any standards for his guidance, because they are repugnant to Article II, Sec. 26 of the Constitution of the state of Ohio which provides that no act be passed to take effect upon the approval of any other authority than the General Assembly, because they are repugnant to Article II, Sec. 28 of the Constitution of the state of Ohio which provides that the General Assembly shall have no power to pass laws impairing the obligation of contracts, and Article I, Sec. 19 of the Constitution of the state of Ohio which provides that private property shall ever be held inviolate, and because they are repugnant to Article I, Sec. 10 of the Constitution of the United States of America which provides that no state shall pass any law impairing the obligation of contracts, and Section I, Amendment 14, to the Constitution of the United States of America which provides that no state shall deprive any person of property without due process of law."

The Court of Common Pleas sustained the demurrers to the answers and granted injunctions upon the stated ground that "This statute as it now stands impairs the obligation of contract without due process of law and until such processes of law are contained in the statute as were contained in the general corporation statute, it is this court's opinion that it is unconstitutional."

This conclusion was reached without the introduction of any evidence.

In the *Belden case* an appeal was perfected to the Court of Appeals upon questions of law and fact, and in the *Koplin case*, an appeal was perfected on questions of law.

In the Court of Appeals, upon leave, Belden filed an amendment to his petition in substantially the same lan-

guage as the amendment filed by Koplin in the Court of Common Pleas, hereinbefore quoted.

The cases were argued and disposed of together in the Court of Appeals. Appellee Belden, having waived his right to a remand and further proceedings in the Court of Common Pleas, the Court of Appeals dismissed his petition and rendered judgment in favor of Union Central. In the *Koplin case* the judgment was reversed and the cause remanded.

A motion was filed in each case in this court to certify the record, also an appeal as a matter of right, and a motion was filed in each case to dismiss the appeal as a matter of right. The motions to certify the records were allowed and the motions to dismiss the appeals as a matter of right were overruled. The cases are here for consideration upon the merits.

Messrs. Schnee, Grimm & Belden and *Messrs. Slabaugh, Seiberling, Guinther & Pflueger,* for appellants.

Messrs. Wise, Roetzel & Maxon and *Messrs. Dinsmore, Shohl, Sawyer & Dinsmore, Mr. Stanley K. Henshaw* and *Mr. Virgil D. Parish,* for appellee The Union Central Life Insurance Company.

Messrs. Buckingham, Doolittle & Burroughs and *Messrs. Bettinger, Schmitt & Kreis,* for appellee The Ohio National Life Insurance Company.

Bell, J. These cases were presented together. They involve identical questions and will be disposed of in this opinion.

At the outset it is important to emphasize (1) that the attacks upon the respective plans of mutualization of Union Central and Ohio National are made by policyholders; (2) that the rights of each policyholder are fixed by the terms of his contract (life insurance policy); (3) that the controversies were disposed of in the Court of Appeals upon demurrers to the answers; and (4) that each of the appellants having failed to offer evidence in support of the allegations of his petition, there are no presently established facts (except those alleged in the answer, which are admitted by the demurrer thereto) before this court for consideration in determining the questions at issue.

The ultimate question to be determined is whether the act passed by the General Assembly, entitled an act "to revise the laws relating to the conversion of stock life insurance corporations into mutual life insurance corporations and for that purpose to amend Sections 9364-1, 9364-2, and 9364-3 of the General Code, and to enact Sections 9364-2*a*, 9364-2*b*, 9364-4, 9364-5, 9364-6, 9364-7 and 9364-8 of the General Code" (119 Ohio Laws, 70) is unconstitutional and void.

The attacks by appellants upon the constitutional validity of the act are two-fold: (1) That the act is unconstitutional and void on its face, being in conflict with Section 1, Article II of the state Constitution in that the act delegates legislative power to the superintendent, and with Section 26, Article II of that same instrument, in that the act is to take effect upon the approval of some authority other than the General Assembly; and (2) that the act is unconstitutional and void because the operative effect thereof, as applied to the respective plans of mutualization adopted by Union Central and Ohio National, results in the impairment of the obligation of the contract between the policyholder and his company, and amounts to the taking of property without due process of law in violation of Section 19, Article I, and Section 28, Article II, Constitution of Ohio, and Section 10, Article I, and Section 1, Fourteenth Amendment, Constitution of the United States.

These claims will be considered in the order stated.

Before directing our attention to the specific questions presented it should be observed that although the legislatures of Pennsylvania, Illinois, New Jersey, Indiana, California and New York have enacted legislation authorizing the conversion of a stock life insurance corporation into a mutual life insurance company, and although numerous companies have been so converted, there are no reported cases by courts of last resort that experienced and diligent counsel have been able to find wherein a policyholder has contested the constitutionality of an act authorizing such conversion.

It is the duty of this court to reconcile legislative acts with constitutional provisions, if possible, but it is equally our

duty to strike down any act which clearly conflicts with the provisions of the Constitution of the United States or the Constitution of this state.

A legislative act may be unconstitutional upon its face or it may be valid on its face but unconstitutional because of its operative effect upon a particular state of facts. See *Poindexter* v. *Greenhow, Treas.*, 114 U. S., 270, 29 L. Ed. 185, 5 S. Ct., 903; *N. C. & St. L. Ry.* v. *Walters, Commr.*, 294 U. S., 405, 79 L. Ed., 949, 55 S. Ct., 486; *Webb* v. *Adams*, 180 Ark., 713, 23 S. W. (2d), 617; *State, ex rel. Moseley*, v. *Lee*, 319 Mo., 976, 5 S. W. (2d) 83; *Max Factor & Co.* v. *Kunsman*, 5 Cal. (2d), 446, 55 P. (2d), 177; *Gray, Secy. of State*, v. *Central Florida Lumber Co.*, 104 Fla., 446, 140 So., 320; *Miami Home Milk Producers Assn.* v. *Milk Control Bd.*, 124 Fla., 797, 169 So., 541; *State, ex rel. Miller*, v. *Doss, Assessor*, 141 Fla., 233, 192 So., 870; *State, ex rel. Harper*, v. *McDavid*, 146 Fla., 1, 200 So., 100; *Lee* v. *Smith*, 189 Miss., 636, 198 So., 296; *Pennsylvania Rd. Co.* v. *Driscoll*, 330 Pa., 97, 198 A., 130; *State, ex rel. Woolsey*, v. *Morgan, Clerk*, 138 Neb., 635, 294 N. W., 436; *State, ex rel. Davenport*, v. *International Harvester Co.*, 216 Ind., 463, 25 N. E. (2d), 242; *Village of South Holland* v. *Stein*, 373 Ill., 472, 26 N. E. (2d), 868, 127 A. L. R., 957; *Daly* v. *Madison County*, 378 Ill., 357, 38 N. E. (2d), 160; *Castle* v. *Mason*, 91 Ohio St., 296, 110 N. E., 463, Ann. Cas. 1917A, 164; *Village of Euclid* v. *Camp Wise Assn.*, 102 Ohio St., 207, 131 N. E., 349; *Voeller* v. *Neilston Warehouse Co.*, 136 Ohio St., 427, 26 N. E. (2d), 442.

The first subject to engage our attention is one of legislative power.

Section 2, Article XIII of the state Constitution reads in part as follows:

"Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. • • •"

This provision of the Constitution was adopted on September 3, 1912, and affords full and complete authority to the General Assembly to provide by general laws for the formation of corporations and for changes in the organization or structure of existing corporations.

This provision was in full force and effect when each of the appellants entered into his contract with his respective company and therefore he could have no vested right in the corporate structure of the company. He knew or is presumed to have known that the General Assembly had express constitutional authority to authorize a change in the organization or structure of any corporation formed under the laws of this state.

Our next question is: Does the act delegate legislative power to the superintendent?

Section 1, Article II of the state Constitution provides in part:

"The legislative power of the state shall be vested in a general assembly * * *."

It is firmly established that the General Assembly cannot delegate its legislative power and that any attempt so to do is unconstitutional. See *Cincinnati, W. & Z. Rd. Co.* v. *Commrs. of Clinton County*, 1 Ohio St., 77; *State, ex rel. Allison*, v. *Garver*, 66 Ohio St., 555, 64 N. E., 573; *State, ex rel. Godfrey*, v. *O'Brien, Treas.*, 95 Ohio. St., 166, 115 N. E., 25.

On the other hand legislative acts granting to a board or an administrative agency *quasi*-legislative or *quasi*-judicial power, have been uniformly sustained where the General Assembly has laid down the policy and established the standards while leaving to an administrative agency the making of subordinate rules within prescribed limits and the determination of facts to which the legislative policy is to apply. See *Village of Fairview* v. *Giffee*, 73 Ohio St., 183, 76 N. E., 865; *Miami County* v. *City of Dayton*, 92 Ohio. St., 215, 110 N. E., 726; *Fassig* v. *State, ex rel. Turner, Atty. Genl.*, 95 Ohio St., 232, 116 N. E., 104; *Green* v. *State Civil Service Commission*, 90 Ohio St., 252, 107 N. E., 531.

It is here claimed that the General Assembly failed to state its policy with reference to mutualization; failed to establish a standard for the superintendent to follow; and failed to require a finding in the exercise of his authority to authorize the mutualization, all of which it is claimed amounts to a delegation of legislative power. It is further

claimed that the law takes effect upon the authority of the superintendent and not upon authority of the General Assembly. Attacks, such as here made upon legislative action, upon the ground of "delegation of legislative power," are neither new nor novel. No hard and fast rule can be formulated as to what is or what is not a *delegation of legislative power*. Whenever this question is raised the answer must be found in the language of the act under attack.

It must be conceded that the legislative body cannot deal with each specific case and therefore legislative action in the main must be general in character, which is the basis for the rule that it is no violation of the constitutional inhibition against the delegation of legislative power for the General Assembly to establish a policy and fix the standards for guidance of administrative agencies, while leaving to them the the making of subordinate rules within those fixed standards, and the determination of facts to which the legislative policy applies.

In our state the granting of the rule-making power to the Department of Health, the Tax Commissioner and the Board of Tax Appeals, and the granting of the fact-finding power to the Industrial Commission and the Public Utilities Commission, are but a few examples of such legislation. None of the acts granting such powers has been found to be unconstitutional.

The General Assembly of Ohio has been diligent and painstaking in its attempt to protect the public in financial matters. It has set up administrative agencies for the supervision of banks, building and loan associations, insurance companies and stock brokers.

A casual reading of the acts creating such agencies and defining their duties will disclose that those agencies have been granted *quasi*-legislative and *quasi*-judicial powers.

It must be kept in mind, also, that the act here in question is permissive, not mandatory, and that mutualization can never be effected unless a majority of the directors, shareholders and policyholders, and the superintendent approve.

A literal quotation of the entire act would unduly extend this opinion, therefore we shall be content with calling attention to the specific parts thereof which we deem pertinent to and dispositive of the questions involved.

Section 9364-1, General Code, grants authority for the conversion of any domestic stock life insurance company, incorporated under general law, into a mutual life insurance company and provides that the company to that end may carry out a plan for the acquisition of the shares of its capital stock.

Before any plan may become effective four successive steps must be accomplished. (1) The plan must be approved by a vote of a majority of the directors of such corporation; (2) the plan must be approved by a vote of shareholders, representing a majority of the capital stock then outstanding, at a meeting called for that purpose; (3) the plan must be approved by a majority of the policyholders voting at a meeting called for that purpose; and (4) the plan must be submitted to the superintendent and approved by him, in writing, provided that where the purchase price of the shares of the capital stock of the corporation has been fixed by the plan neither the plan nor any such payment shall be approved by the superintendent unless at the time of the approval the corporation, after deducting the aggregate sum appropriated by such plan for the acquisition of any part or all of its capital stock, shall possess assets sufficient to maintain with the superintendent its deposit theretofore made with him, not less than the entire liabilities of the corporation including the net values of its outstanding contracts computed according to the standard adopted by the corporation under the provisions of Section 636, General Code, and also all funds, contingent reserves and surplus save so much of the latter as shall have been appropriated or paid under such plan.

Section 9364-2 makes provision for the acquisition of stock in the carrying out of any plan of mutualization and the holding of such shares in trust until all the shares shall have been acquired.

Section 9364-2*a* provides for protection of the rights of dissenting shareholders and for the abandonment of the plan at any time prior to the time of the vote of the policyholders.

Section 9364-2*b* provides for the appointment of trustees to hold any shares of the capital stock acquired under the

plan as provided in Section 9364-2, and further provides that existing suits, rights, or contracts of the company shall not be affected by the plan.

Section 9364-3 provides for the officers and directors after a stock life insurance company has been converted into a mutual company.

Section 9364-4 provides how and by whom the corporate powers shall be exercised, including the qualifications of persons competent to be elected directors or trustees.

Section 9364-5 provides for the terms of the directors or trustees.

Section 9364-6 provides for meetings of the directors or trustees.

Section 9364-7 grants authority for selection by the directors of an executive committee.

Section 9364-8 provides for a code of regulations of a mutualized corporation, what the code shall contain, the manner of voting by the policyholders and the method of amending or repealing such code.

This outline of the act is sufficient to demonstrate that the General Assembly has clearly defined the legislative policy for mutualization.

The act is a part of the Insurance Code of Ohio (Sections 9339 to 9642, both inclusive, General Code).

Reverting to the power and duty of the superintendent under the act, it is manifest that after the plan of mutualization shall have been approved by the board of directors, the shareholders and the policyholders, the plan shall be approved by the superintendent if he finds that the financial condition of the company is such as to satisfy the requirements of the act.

By the provisions of Sections 617 to 673, both inclusive, General Code, the superintendent is granted wide latitude and authority in supervising the operations of insurance companies. It is his mandatory duty to see that the laws relating to insurance companies are duly executed and enforced (Section 617). He is granted power to administer oaths and compel the attendance of witnesses to testify upon any matter relating to insurance (Section 623); he may at any time examine the financial affairs of any insurance

company (Section 625); and he may take charge of the property of any insurance company when insolvent or in unsound financial condition (Section 634-2).

The provisions of the insurance code are for the protection of the shareholders, the policyholders and the public at large, and no insurance company should be or is exempt from these salutary provisions.

The act, here in question, makes the approval by the superintendent a condition precedent to the mutualization plan becoming effective, in order to insure the policyholders against any possibility of financial disaster by the adoption of such plan. It seems to us that an attack by a policyholder upon a statute obviously enacted for his benefit and protection presents an anomaly.

In *Fassig* v. *State, ex rel. Turner, Atty. Genl., supra,* paragraph two of the syllabus reads as follows:

"The line which separates power to make laws from power to interpret and apply laws is not exactly defined. The Legislature cannot confer upon tribunals, other than courts, powers which are strictly and conclusively judicial. But in providing for the enforcement of its enactments, it may clothe administrative officers with power to ascertain whether certain specified facts exist, and thereupon to act in a prescribed manner, without delegating to such officers legislative or judicial power within the meaning of the Constitution."

See 16 Corpus Juris Secundum, 399, Section 140; 8 Ohio Jurisprudence, 318, Section 214; *Cincinnati W. & Z. Rd. Co.* v. *Commrs. of Clinton County, supra; Green* v. *State Civil Service Commission, supra; State, ex rel. Campbell, Pros. Atty.,* v. *Cincinnati Street Ry. Co.,* 97 Ohio St., 283, 119 N. E., 735; *Matz, Admr.,* v. *J. L. Curtis Cartage Co.,* 132 Ohio St., 271, 7 N. E. (2d) 220; *Panama Refining Co.* v. *Ryan,* 293 U. S., 388, 79 L. Ed., 446, 55 S. Ct. 241; *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S., 495, 79 L. Ed., 1570, 55 S. Ct., 837, 97 A. L. R., 947.

It seems clear, both upon reason and authority, that while the General Assembly may not delegate the exercise of its

discretion as to what the law shall be, it may confer dis
cretion in the administration of the law.

In the consideration of this act, we think that it must b
read and construed in the light of the provisions of Par
First, Title III, Division II, Chapter 2 of the General Code
entitled "Superintendent of Insurance" (Sections 617 t
673, both inclusive).

These companies, if and when mutualized, will remai
domestic life insurance corporations subject to the pro
visions of law applicable thereto and will remain subjec
to the supervision of the superintendent to the same exten
as before mutualization.

The superintendent by the terms of the act in questio
is granted authority to determine, from an examination o
the books of the company at the time his approval is re
quested, whether the company is in such financial conditio
that the conversion may be consummated without loss o
harm to its creditors, its shareholders or its policyholders

The act makes it the duty of the superintendent to deter
mine whether certain specific facts exist, to wit, whethe
the company, after deducting the aggregate sum to be pai
for the outstanding shares of the capital stock, shall b
possessed of assets sufficient to maintain its deposit wit
him as provided by law, not less than the entire liabilitie
of the company including the net value of its outstandin
contracts computed according to its previously adopte
standard as provided by law, and also all funds, contingen
reserves and surplus except so much of the surplus a
shall have been appropriated to purchase the outstandin
shares of the capital stock.

If he finds the company has sufficient assets as require
by the act he shall give his approval, otherwise he sha
reject the plan.

We think that the act definitely defines the legislativ
policy; that it does establish standards for the guidance o
the superintendent in approving or rejecting the plan; an
that it does not delegate legislative power, within the mean
ing of the Constitution.

The contention that the act takes effect upon the ap
proval of the superintendent is without merit. The mutua

ization takes effect upon his approval, but the act took effect in the manner and at the time for the taking effect of legislative acts as provided by the Constitution.

From what has been said it follows that the act is not unconstitutional and void upon its face.

We will now direct our attention to the second phase of the controversies—that the act is unconstitutional and void because of the operative effect thereof as applied to the respective plans.

In the *Belden case* no meeting has been held, as yet, for the purpose of the policyholders voting to approve or reject the plan and in neither case has the plan ever been submitted to or approved by the superintendent. For aught we know from the record neither proposed plan may ever be consummated.

In the *Belden* case the directors and shareholders have it in their power to rescind the plan and in both cases the superintendent may reject the plans. These facts alone form a sufficient basis to disapprove the claim of unconstitutionality because of operative effect of the act as applied to the respective plans.

There is in each case however a more cogent reason for this conclusion.

As has been stated these cases were disposed of in the Court of Appeals upon general demurrers to the answers.

Where, as here, an attack is made upon an act which is valid on its face, upon the ground that, as applied to a given state of facts, it is invalid, the burden rests upon the party making such attack to present clear and convincing evidence of a presently existing state of facts, which makes such act unconstitutional and void when applied thereto. See *Nashville, C. & St. L. Ry. Co.* v. *Walters, Commr.*, 294 U. S. 405, 79 L. Ed. 949, 55 S. Ct. 486.

By the general demurrers all facts well pleaded in the answers are admitted as true. In the *Belden* case the answer of Union Central avers that as of December 31, 1940, its assets amounted to $413,679,712; that $398,884,078.64 is allocated to the owners of policies in the form of reserves, in which the shareholders have no interest, leaving approximately $14,800,000 in the capital and surplus accounts. If

the proposed plan should become effective, and $3,125,000 is paid for the purchase of all of the shares of the capital stock, the policyholders would become the owners of the company including the approximate $11,675,000 still remaining in the capital and surplus accounts after payment of the $3,125,000 purchase price for all the shares.

The answer further avers that as of December 31, 1942, its total assets were about 456 million dollars which in all probability would increase the amount of reserves as well as the capital and surplus accounts.

Whether the conversion of Union Central or Ohio National from a stock to a mutual company is beneficial to the policyholders is not for us to say; that question, under the provisions of the act, is left to the policyholders to decide, and whether the payment of the price, as stipulated in the respective plans, for the outstanding shares of the capital stock is inequitable to the policyholders or would involve the financial structure of the companies is a question for decision by the superintendent, at such time as the plan is submitted to him for approval.

The only question before the court is whether upon the record as presented we can say that the obligation of the contracts between the policyholders and Union Central or Ohio National are impaired or that the policyholders are deprived of their property without due process of law.

We have little difficulty with the proposition that there is no such special state of facts presented as would warrant the conclusion that the act is unconstitutional as applied to the Union Central plan.

The *Koplin et al.* v. *Ohio National* case is unlike the *Belden et al.* v. *Union Central* case in that (1) Koplin is the owner of a nonparticipating policy; and (2) by the plan the board of directors is authorized to purchase "from time to time as funds are available" the stock of its shareholders at a price of $40 per share.

The claim that Koplin has any vested right in the organizational structure of Ohio National cannot be sustained either in logic or by authority.

In the case of *Ohio, ex rel. Natl. Life Assn.*, v. *Matthews, Supt. of Ins.*, 58 Ohio St. 1, 49 N. E. 1034, 40 L. R. A. 418,

Judge Bradbury used this language which is especially applicable to the position of a nonparticipating policyholder:

"The ultimate power to manage its affairs is lodged in its stockholders to the entire exclusion of its policyholders, for the right to attend corporate meetings as well as to elect its officers is vested solely in the former; whatever net profits may accrue from its business will ultimately go to its stockholders, the policyholders having no interest therein; the rights of the latter being measured by the contract evidenced by their respective policies. It is true that, in an agreed statement of facts submitted to the court, it is stated that: 'The plaintiff pays a dividend of six per cent per annum on the amount of stock actually paid into its treasury; the same being paid out of moneys raised and used by it for expense purposes, and the amount thereof being $3,000 per annum.' We do not see how this bears upon the question of the character or nature of the concern. There is nothing in its charter to prevent the payment of a larger dividend if the earnings of the company at any time would warrant it, or to prevent its setting aside or investing its accumulation in any way it may choose for the eventual benefit of its stockholders."

Under the plan in controversy in the *Koplin* case the shares of stock are to be acquired from time to time as funds are available.

Section 9364-2*b* specifically provides in part:

"* * * Neither the retirement of its capital stock nor the amendment of its articles of incorporation, as herein provided, shall affect existing suits, rights or contracts of the corporation. * * *"

By virtue of the provisions of Section 617, it is the mandatory duty of the superintendent to see that the law relating to insurance, including the above-quoted part of Section 9364-2*b*, is duly executed and enforced.

We assume that the superintendent will do his full duty, and if that be true, these policyholders will not be deprived of their property without due process of law, nor will the obligation of their contracts be impaired.

In the case of *State, ex rel. Herbert* v. *Ferguson, Auditor*, 142 Ohio St. 496, 52 N. E. (2d) 980, this court by a unanimous decision held "constitutional questions will not be decided until the necessity for a decision arises on the record before the court."

The Court of Appeals entered final judgment in the *Belden* case in favor of Union Central and that judgment should be and is hereby affirmed.

In the *Koplin* case the Court of Appeals reversed the judgment of the Court of Common Pleas and remanded the cause to that court for further proceeding according to law. We think the Court of Appeals should have rendered final judgment also in favor of Ohio National. The plan of mutualization in the *Koplin* case not having been submitted to or approved by the superintendent, it would be impossible for Koplin to make a record based upon any presently existing state of facts calling for a decision upon the constitutionality of the act on the basis of its operative effect. In the *Koplin* case, final judgment will be entered in favor of Ohio National.

Judgments accordingly.

Weygandt, C. J., Matthias, Hart, Zimmerman, Williams and Turner, JJ., concur.

FILED
SEP 9 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 450

SCOTT A. BELDEN, ON BEHALF OF HIMSELF AND ALL OTHER POLICYHOLDERS OF THE UNION CENTRAL LIFE INSURANCE COMPANY, AN OHIO CORPORATION, SIMILARLY SITUATED,

Appellants,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY

APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

FRANK F. DINSMORE,
WALTER M. SHOHL,
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VIRGIL D. PARISH,
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WISE, ROETZEL & MAXON,
Of Counsel.

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IN THE SUPREME COURT OF THE STATE OF OHIO

No. 29621

SCOTT A. BELDEN, ON BEHALF OF HIMSELF AND ALL OTHER POLICYHOLDERS OF THE UNION CENTRAL LIFE INSURANCE COMPANY, AN OHIO CORPORATION, SIMILARLY SITUATED,

Appellant,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Appellee.

COUNTER-STATEMENT OF APPELLEE AS TO JURISDICTION AND MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT.

COUNTER-STATEMENT OF APPELLEE AS TO JURISDICTION

Pursuant to the provisions of Rule 12, Paragraph 3, of the Supreme Court of the United States, appellee files its counter-statement disclosing certain matters and grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellant.

Nature of the Case

Belden, the holder of a life insurance policy in the face amount of $5,000.00, filed his petition against The Union Central Life Insurance Company in the Court of Com-

mon Pleas of Summit County, Ohio. The petition alleged that pursuant to the provisions of Sections 9364-1 to 9364-8 of the General Code of Ohio, The Union Central Life Insurance Company, a stock life insurance company, had commenced proceedings to become a mutual life insurance company. It was alleged that such a plan had been approved by a majority of the directors of said company and by a vote of the shareholders representing a majority of the capital stock outstanding. In substance, the further allegations of the petition were that if the plan were carried out, surplus funds belonging to the policyholders would be used to pay the shareholders for their stock, and that the corporation would be left with inadequate assets to secure the payment of the various policies as they fall due. Plaintiff prayed for an injunction restraining the company from proceeding under the above mentioned mutualization statutes of Ohio on the ground that they violated *Section 1, Article 2, Section 26, Article 2, Section 19, Article 1,* and *Section 28, Article 2,* of the Constitution of the State of Ohio, and also *Section 10, Article 1,* and *Section 1* of the 14th Amendment of the Constitution of the United States.

Defendant, The Union Central Life Insurance Company, filed an answer in substance alleging facts showing that no funds belonging to the policyholders would be paid to the shareholders under the plan; that under the plan there would remain a surplus of approximately $11,000,000 in excess of adequate legal reserves for the payment of outstanding policies as they fell due; that the action was prematurely brought since although a meeting of policyholders was called, it was adjourned without action; and further that the Superintendent of Insurance had not taken the action as provided in the above mentioned statutes of the State of Ohio.

Belden filed a demurrer to the answer. The Court of Common Pleas sustained the demurrer, and the defendant electing not to plead further, judgment was entered for the plaintiff.

The defendant appealed to the Court of Appeals for the Ninth Judicial District of the State of Ohio. In that court the pleadings were amended, and the case was submitted on the amended petition, amended answer, and demurrer of the plaintiff to the latter. It will be noted that the amended answer, while containing certain admissions, included, in accordance with the Ohio practice, a general denial as follows:

> "Defendant further answering denies each and every allegation of plaintiff's petition not hereinbefore specifically admitted to be true."

The Court of Appeals overruled the demurrer, and the plaintiff not desiring to plead further and electing not to offer any evidence, final judgment was rendered for the defendant.

Upon appeal by plaintiff to the Supreme Court of Ohio, the judgment of the Court of Appeals was affirmed. In affirming the judgment of the Court of Appeals, the Supreme Court in its opinion stated in part:

> "At the outset it is important to emphasize: • • • (3) that the controversies were disposed of in the Court of Appeals upon demurrers to the answers; and (4) that each of the appellants having failed to offer evidence in support of the allegations of his petition, there are no presently established facts (except those alleged in the answer, which are admitted by the demurrer thereto) before this court for consideration in determining the questions at issue." *Belden* v. *Union Central Life Ins. Co.*, 143 Ohio State 329, at 339.

Notwithstanding the foregoing condition of the record as recognized by the Supreme Court of Ohio, appellant

asserts in his statement as to jurisdiction (page 11) that appellee had exhausted all of the surplus arising on all the earnings on non-participating policies. We challenge this statement as contrary to fact. Moreover, we respectfully contend that there is no such allegation in the petition, but if there were, it stands denied and appellant has elected not to try to prove it.

Argument

The case proceeded on appellant's assertion that the State of Ohio had no power to pass the statutes in question. The sections of the General Code of Ohio attacked by appellant are very similar to the Codes of other states, such as New York, New Jersey and Pennsylvania, under which the mutualizations of many of the large life insurance companies of the United States have been accomplished. Appellant's contentions were (a) the statute as such necessarily operated to impair the obligation of plaintiff-appellant's contract; (b) the statute necessarily operated to take plaintiff-appellant's property without due process of law; and (c) the statute unlawfully delegated legislative power to the Superintendent of Insurance.

Considering these points in inverse order, it will be noted that the Supreme Court held that, properly construed, the sections of the Code in question did not constitute a delegation of legislative power. This argument was concerned solely with the Ohio Constitution, and we submit that no Federal question was or is presented.

The decision of a state supreme court to the effect that a statute of the state is valid under the state's constitution is not reviewable by the United States Supreme Court. In re *Kemmler,* 136 U. S. 436, 447; *McElvaine* v. *Brush,* 142 U. S. 155; *Sage* v. *Louisiana Board of Liquidation,* 144 U.

S. 647; *Powell* v. *Brunswick County*, 150 U. S. 433; *Peters* v. *Broward*, 222 U. S. 483.

It will be noted with respect to the question of impairment of contracts that under the insurance laws of Ohio, all of the terms of the policy or contract are required to be set forth in the written instrument. Section 9420, Paragraph 3, General Code of Ohio. Plaintiff-appellant obviously undertook to inject into this case a contract which does not exist, to the effect that the insurance company has covenanted not to change its corporate structure.

The Supreme Court of Ohio proceeding to a discussion and determination respecting the statute, at pages 348 and 349, (143 Ohio State) said:

> "We will now direct our attention to the second phase of the controversies—that the act is unconstitutional and void because of the operative effect thereof as applied to the respective plans.
>
> In the *Belden* case no meeting has been held, as yet, for the purpose of the policyholders voting to approve or reject the plan and in neither case has the plan ever been submitted to or approved by the superintendent. For aught we know from the record neither proposed plan may ever be consummated.
>
> In the *Belden* case the directors and shareholders have it in their power to rescind the plan and in both cases the superintendent may reject the plans. These facts alone form a sufficient basis to disapprove the claim of unconstitutionality because of operative effect of the act as applied to the respective plans."

At page 350, it is further stated:

> "Whether the conversion of Union Central or Ohio National from a stock to a mutual company is beneficial to the policyholders is not for us to say; that question, under the provisions of the act, is left to the policyholders to decide, and whether the payment of the price,

as stipulated in the respective plans, for the outstanding shares of the capital stock is inequitable to the policyholders or would involve the financial structure of the companies is a question for decision by the superintendent, at such time as the plan is submitted to him for approval."

At page 352, the court stated:

"We assume that the superintendent will do his full duty, and if that be true, these policyholders will not be deprived of their property without due process of law, nor will the obligations of their contracts be impaired.

In the case of *State ex rel. Herbert* v. *Ferguson, Auditor,* 142 Ohio St. 496, 52 N. E. (2d) 980, this court by a unanimous decision held 'constitutional questions will not be decided until the necessity for a decision arises on the record before the court.' "

An examination of the entire opinion rendered by the Supreme Court of Ohio does not disclose that a determination of the constitutionality of the statutes was necessary to its decision of the case.

Under the Ohio statute to effectuate mutualization, four consecutive separate steps are required. They are:

(a) Action by the directors;
(b) Action by the stockholders;
(c) Action by the policyholders at a meeting to be held for the purpose;
(d) Findings by the Superintendent of Insurance after the completion of the first three steps.

The record shows that the first two steps had been taken and that thereafter the meeting of policyholders was adjourned from time to time and ultimately was held and, before a vote was taken, was adjourned to reconvene at the call of the Superintendent of Insurance. It has never been reconvened. Necessarily no action has been taken or could

be taken by the policyholders. As to the fourth step we call to the court's attention the statement by appellant on page 16 of appellant's Statement as to Jurisdiction, that "the chances are that the Superintendent of Insurance would not consent to preside at a meeting of the policyholders to consider a plan to which he had any objection," and the appellant's further statement "appellant was confronted with this situation and he had the right to assume that the Superintendent of Insurance would approve the plan." The court will bear in mind that under Section 9364-1, General Code of Ohio, the Superintendent of Insurance was ordered by statute to supervise the procedure of the meeting.

It will also be borne in mind that no facts are shown in the amended petition warranting the conclusion that plaintiff-appellant could sustain any loss by reason of the mutualization.

In view of the foregoing, the decision of the Supreme Court of Ohio was proper in holding that there was not shown "a presently existing state of facts which makes such act unconstitutional and void when applied thereto" and further, the court was led to include therein: "Constitutional questions will not be decided until the necessity for a decision arises on the record before the court."

It is well established by the decisions of this court that a judgment of a state court which is put upon grounds which include a non-federal ground, independent of the federal question involved and broad enough to sustain the judgment, will not be reviewed by this court.

Petrie v. *Nampa & Meridian Irrigation District,* 248 U. S. 154; *Eustis* v. *Bolles,* 150 U. S. 361; *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157; *Fox Film Corp.* v. *Muller,* 296 U. S. 207; *McCoy* v. *Shaw,* 277 U. S. 302; *Klinger* v. *Missouri,* 80 U. S. 257; *Leathe* v. *Thomas,* 207 U. S. 93;

Parson Son & Co. v. *Bird*, 248 U. S. 268; *Browne* v. *Union Pacific R. R. Co.*, 267 U. S. 255.

Appellant's contention is that any reorganization that reduces the financial ability of the insurance company must be invalid since it reduces the "cushion" for the protection of policyholders, regardless of its financial condition and without allegations or proof of present or prospective loss to appellant policyholder. There is no contention that the corporation is insolvent or will be rendered insolvent and the answer shows that the completion of the mutualization would leave the company with many millions of dollars of surplus.

It is respectfully contended that no federal question is presented.

Motion to Dismiss Appeal or, in the Alternative, to Affirm

Pursuant to Section 12, Paragraph 3, of the Rules of the Supreme Court of the United States, appellee respectfully moves that the appeal be dismissed or, in the alternative, that the judgment be affirmed on the grounds herein set forth in its Counter-Statement of Facts as to Jurisdiction.

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No. 450. BELDEN *v.* UNION CENTRAL LIFE INSURANCE Co.; and

No. 597. KOPLIN *v.* OHIO NATIONAL LIFE INSURANCE Co. Appeals from the Supreme Court of Ohio. November 13, 1944. *Per Curiam:* In each of these cases the motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. *Petrie* v. *Nampa & Meridian Irrigation District*, 248 U. S. 154, 158. *Messrs. Charles F. Schnee* and *Robert Guinther* for appellants. *Messrs. Frank F. Dinsmore* and *Virgil D. Parish* for appellee in No. 450. *Mr. Virgil D. Parish* for appellee in No. 597. Reported below: 143 Ohio St. 329, 56 N. E. 2d 177.